SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 308

IGNATIUS LANZETTA, MICHAEL FALCONE AND LOUIE DEL ROSSI,

Appellants,

vs.

THE STATE OF NEW JERSEY.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF OF THE STATE OF NEW JERSEY.

FRENCH B. LOVELAND,
Prosecutor of the Pleas,
HERBERT F. CAMPBELL,
Assistant Prosecutor,
Attorneys for the State of New Jersey.

ROBERT PEACOCK,
Assistant Attorney General of New Jersey,
of Counsel.

INDEX.

Table of Cases Cited.

STATUTES CITED.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 308

IGNATIUS LANZETTA, MICHAEL FALCONE AND LOUIE DEL ROSSI,

Appellants,

vs.

THE STATE OF NEW JERSEY.

PEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

BRIEF OF THE STATE OF NEW JERSEY.

---

1. Jurisdiction.

The statutory provision concerning the jurisdiction of he United States Supreme Court for a review of this ppeal is as set forth in the defendant's brief, being Section 33 A of the Judicial Code, Act of February 13, 1925, Chapter 229, 43 Stat. 936.

Under the above statute, the appeal in this case should e dismissed because the statute in question is not repug-

nant to the Constitution, Treaties or Laws of the United States, but is a valid statute passed by the Legislature of the State of New Jersey under the police power of the State.

(U. S. Sup. Wash. 1923) In the exercise of police powers the State has wide discretion in determining its own public policy, and what measures are necessary for its own protection, and to promote the safety, peace, and good order of its people. Terrace v. Thompson, 44 S. Ct. 15, 263 U. S. 197, 68 L. Ed. 255.

(U. S. Sup. N. C. 1923) A State Legislature may direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, notwithstanding the equal protection clause of the federal Constitution. Farmers' & Merchants Bank of Monroe, N. C., *v.* Federal Reserve Bank of Richmond, Va., 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157, 30 A. L. R. 635, reversing decree (1922) 112 S. E. 252, 183 N. C. 546.

The police power embraces the protection of the lives, health, and property of citizens, the maintenance of good order, and the preservation of good morals. Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The power of the Legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the sovereignty of the State, and cannot be bartered away by contract or otherwise. New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516.

Statement.

The Cape May County Grand Jury of the April Term, 1936, in session on July 31, 1936, indicted the three appellants, Frank Pius, alias Ignatius A. Lanzetta, etc.; Michael Falcone, alias Mickey Britt; and Louis Del Rossi, alias

Fattie Louie, for violation of Chapter 155 of the Laws of 1934, commonly called "Gangster Act" or "Public Enemies Act."

The pertinent sections of the act under which the defendants were convicted are as follows:

1. A gangster is hereby declared to be an enemy of the State.

4. Any person, not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.

Said indictment was tried on September 14 and 15, 1936, and a verdict returned of "guilty, with recommendation for mercy." Upon that judgment of conviction, appellants were sentenced to a term of not more than ten years and not less than five years in State's Prison. Following the conviction, a writ of error was prosecuted in the Supreme Court of New Jersey and judgment affirmed. Then an appeal was taken to the Court of Errors and Appeals with like result. The present appeal alleges error in such affirmance.

Facts.

Appellants were arrested, either simultaneously or within a few minutes of each other, at or in the vicinity of 107 East Crocus Road, Wildwood Crest, on July 24, 1936. The arrests were made by officers of the New Jersey State Police, in cooperation with members of the Philadelphia Police Department (R. 17, 25, 27, 28). The association of the defendants at said address was proven (R. 16, 17, 20, 24, 25).

When questioned at or about the time of their arrest, the defendants all claimed to have occupations, but the

most recent work done by any one of them at his alleged occupation was more than two years before the arrest; Lanzetta had not been employed for five years, DelRossi for over two years and Falcone for four years (R. 19-20, 26).

Detective Captains Ryan and Creeden and Detective Peltz, all of the Philadelphia Police Department, testified that they knew the defendants to be members of "the Lanzetta gang" (R. 33, 40).

Prior convictions of crimes in the State of Pennsylvania were proven against the three defendants, both by the testimony of police officers who were personally present when such convictions were had, and by exemplified copies of the proceedings.

The defendants did not take the stand to testify each in his own behalf.

The question concerning the weight of evidence is not before this Court because the weight of evidence, on exceptions and error were abandoned in the Court of Errors and Appeals of New Jersey. Further, appellants admit the crime to be proven as in the brief of counsel for appellants, he states as follows:

> "The State obtained a conviction by proving:
>
> (1) That defendants were convicted of crime in Pennsylvania prior to the date this statute became a law.
>
> (2) That defendants were 'known' by the Philadelphia police to be members of the Lanzetta gang of Philadelphia, Pennsylvania.
>
> (3) That they were unemployed at the time of the arrests." (Brief, pp. 7 and 8).

ARGUMENT.

I.

Act Is a Valid Exercise of the Police Power, and as Such, Does Not Contravene the "Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution."

this case the State of New Jersey contemplated an that would prevent gangsters from descending upon State from other States or gangsters in this State ning themselves into gangs for the purposes of com- ing crimes. The State of New Jersey, as a part of olice power, has a large measure of discretion in creat- and defining criminal offenses, and a statute of this racter does not violate the due process provision of Federal Constitution, nor deny the violators of the ute the equal protection of the laws, where it operates out discrimination on all persons, and classes of per- , similarly situated, nor does it violate the provisions he State Constitution of New Jersey under which such slation was upheld by a decision of the Court of Errors Appeals in the case of *Levine* v. *State*, 110 N. J. L. 467. Where the words by which the offense is created and de- d by statute are fully descriptive of it, and therefore nical, the offense may be charged in the general words he statute, without particularizing the offense.

The police of a State, in a comprehensive sense, embraces whole system of internal regulation, by which the State ts not only to preserve the public order and to prevent nses against the State, but also to establish for the rcourse of citizens with citizens those rules of good nners and good neighborhood which are calculated to vent a conflict of rights, and to insure to each the un- rrupted enjoyment of his own so far as is reasonably sistent with a like enjoyment of rights by others. ooley Const. Lim. (8th ed.) 1223.

It is the undoubted function of the State to apprehend those who would violate laws ordained to protect the person and property of citizens, and who are seeking the opportunity to do so. Such persons are determined and ever active foes of society. Due process required that a penal statute be sufficiently explicit to inform those subject to it what conduct on their part will render them liable to its penalties and that it should be couched in terms not so vague that men of common intelligence must necessarily guess at its meaning.

In the case of *Whitney* v. *People of State of California*, 274 U. S. 357, the Court held:

> "The determination of the Legislature that the acts defined involve such danger to the public peace and security of the State that they should be penalized in the exercise of the police power must be given great weight and every presumption be indulged in favor of the validity of the statute, which could be declared unconstitutional only if an attempt to exercise arbitrarily and unreasonably the authority vested in the State in the public interest. (p. 371)
>
> "The equal protection clause (Const. U. S. Amend. 14) does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without a reasonable basis and purely arbitrary.
>
> "A statute does not violate the equal protection clause merely because it is not all-embracing; hence a State may properly direct its legislation against what it deems an existing evil, without covering the whole field of possible abuses.
>
> "A statute must be presumed to be aimed at an evil where most felt, and is not to be overthrown as violative of equal protection clause merely because other instances may be suggested to which it might also be applied."

The Court further said in the above case:

"It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in International Harvester Co. v. Kentucky, 234 U. S. 216, 221; 34 S. Ct. 853; 58 L. Ed. 516, 14 A. L. R. 1045, because not fixing an ascertainable standard of guilt. The language of section 2, subd. 4, of the act under which the plaintiff in error was convicted is clear; the definition of 'criminal syndicalism' specific.

"The act plainly meets the essential requirements of due process that a penal statute be 'sufficiently explicit' to inform those who are subject to it what conduct on their part will render them liable to its penalties, and be couched in terms that are not 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' Connally v. General Construction Co., 269 U. S. 385, 46 S. Ct. 126, 70 L. Ed. 322. And see United States v. Brewer, 139 U. S. 278, 288; 11 S. Ct. 538; 35 L. Ed. 190; Chicago, etc., 1 L. R. A. 744; Tozer v. United States (C. C.), 52 F. 917. In Omaechevarria v. Idaho, 246 U. S. 343; 38 S. Ct. 323; 62 L. Ed. 763, in which it was held that a criminal statute prohibiting the grazing of sheep on any 'range' previously occupied by cattle 'in the usual and customary use' thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a 'range' or to determine the length of time necessary to constitute a prior occupation a 'usual' one, this Court said:

"'Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this Court. Nash

v. United States, 229 U. S. 373, 377; 33 S. Ct. 780; 57 L. Ed. 1232; Miller *v.* Strahl, 239 U. S. 426, 434; 36 S. Ct. 147; 60 L. Ed. 364.'

"So, as applied here, the Syndicalism Act required of the defendant no 'prophetic' understanding of its meaning.

"And similar Criminal Syndicalism statutes of other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. State *v.* Hennessy, 114 Wash. 351; State *v.* Laundy, 103 Or. 443; 204 P. 958. People *v.* Ruthenberg, 229 Mich. 315; 210 N. W. 358. And see Fox *v.* Washington, 236 U. S. 273; 35 S. Ct. 383; 59 L. Ed. 573; People *v.* Steelik, 187 Cal. 361, 203 P. 78; People *v.* Lloyd, 304 Ill. 23, 136 N. E. 505.

"Neither is the Syndicalism Act repugnant to the equal protection clause, on the ground that as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions.

"It is settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary, and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 62; 31 S. Ct. 337; 55 L. Ed. 369, Ann. Cas. 1912C, 160, and cases cited.

" 'Statute does not violate equal protection clause of Constitution merely because it is not all-embracing and Legislature is free to recognize degrees of harm and may confine its restrictions to those classes of cases

where the need is deemed to be clearest.' Const. U. S. Amend. 14, S. H. Kress & Co. *v.* Johnson, 209 U. S. 511.

"'Requirement of due process is met where in proceedings affecting all persons alike, a person is presented by indictment in Court of competent jurisdiction for commission of offense under law not in itself repugnant to Federal Constitution, and tried in such Court according to regulations and law applicable to proceedings in that jurisdiction in course of an orderly administration thereof after opportunity is presented for hearing and defense.' U. S. ex rel. Mason *v.* Hunt, 16 Fed. Supp. 285."

The appellants argue the statute is unconstitutional because it violates the due process of law clause as found in the 14th Amendment. The fifth amendment is not in controversy as it is a check on the Federal Government only, and is not applicable between State and an individual. So numerous are the citations to this effect, and so elementary is that holding that we do not think it necessary to cite authority.

The 14th Amendment as restrictive against the State, says in part "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

As to what "due process of law" is in terms, volumes would be needed to completely explain. One thing we may be certain of is that "due process" is no limitation on the State in the proper exercise of police power.

The prohibition against deprivation of life, liberty or property without due process of law does not restrict the power of the States to enact regulations respecting the public health and safety. For the public good, individuals must suffer the destruction of property, or even life, rights of necessity being part of the law, and the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority es-

sential to the safety, health, peace, good order, and morals of the community.

Campagnie Francaise v. *Louisiana*, 186 U. S. 380;
Bowditch v. *Boston*, 101 U. S. 18;
Crowley v. *Christensen*, 137 U. S. 89;
In re Jacobs, 98 N. Y. 98; 50 Am. Rep. 636.

"Due process of law" is complied with when a party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when in that trial and proceedings he is deprived of no rights which he is lawfully entitled to.

Frank v. *Mangum*, 237 U. S. 309;
Stewart v. *Michigan*, 232 U. S. 665;
Garland v. *Washington*, 232 U. S. 642;
Watson v. *Maryland*, 218 U. S. 173.

Was this a reasonable exercise of police power? It most certainly was.

Here are three men, known as members of a gang, already having a reputation and having no lawful occupation together. It is only natural for them to conspire to act together at some time in the future against the public good. This statute was passed to check the evil in the beginning rather than to punish after an offense has been committed and thus to insure the public safety.

To cite only a few instances wherein the courts have upheld analagous statutes, mention can be made of the case of *State* v. *Maxcy*, 26 S. C. L. 501, in which the Court with reference to the State vagrancy statute said:

> "I think it is not the main purpose of those acts to proceed by way of punishing for the offense, for vagrancy in itself can hardly be deemed a distinct offense. The acts seem rather intended to afford so

adequate security to the public against the danger to be apprehended on the several classes of persons enumerated or on whom from their want of honest employment or from their vicious pursuits may well be considered as dangerous to society."

New York held a similar statute did not deny due process in *People* v. *Berman,* 282 N. Y. Supp. 484. The statute in question penalizes for disorderly conduct one who bears an evil reputation and with an unlawful purpose consorts with thieves and criminals or frequents unlawful resorts, and creates a presumption against defendant proven to have evil reputation and to have consorted with criminals or individuals of like reputation.

In *ex parte Cutler,* 36 Pac. (2nd) 441, the Court held a statute making it a crime to roam about from place to place without any lawful business not unconstitutional as being too broad or indefinite to state a public offense.

In *Levine* v. *State,* 110, N. J. L. 467, Justice Heher says, in discussing a similar statute: "The manifest purpose of this legislation is to check evil in the beginning and thus to insure the public safety. It provides for the apprehension and punishment of a class that menaces the security of person and property."

We have then, a reasonable exercise of police power, under the due process clause, followed by a regular indictment by grand jury, and trial according to the forms and modes prescribed.—All giving the defendants their due process, which they complained was withheld.

In *ex parte Company* and *ex parte Irvin,* 106 Ohio St. 50, 139 N. E. 204, the Supreme Court of Ohio stated:

"There is perhaps no provision of the Federal Constitution that is more overworked than the Fourteenth Amendment. Counsel generally are apparently unanimous in thinking that any judgment or finding as against the client denies such client the equal protection

> of the laws, or is without due process of law. It has been so many times decided that the Fourteenth Amendment does not limit the States in the proper exercise of police power that citation of authority seems needless."

The State perceived the existence of a menace to the safety and welfare of its people, and, in the exercise of its sovereignty, enacted appropriate legislation to curb the menace at its inception. To deny the existence of gangs and gangsters would be to emulate the fabled antics of the foolish ostrich in burying his head in the sand, or the three wise monkeys, who "hear no evil, see no evil, and speak no evil." Having acknowledged the condition, it was entirely fitting that the legislature should act as it did. In *Hopper* v. *Stack*, 69 N. J. L. 562, it was held:

> "The recognition by the Legislature of the existence of conditions that, in its judgment, require regulation under its police power, is to be distinguished from the creation by the Legislature of conditions that previously had no existence."

The questions of due process and class legislation are interestingly discussed in *State* v. *Rheaume* (New Hampshire), 116 Atl. 758 at 759, as follows:

> "But this clause (the 14th Amendment) was not designed to interfere with the exercise of the police power of the States for the protection of the lives liberty and property of its citizens or for the promotion of the public safety, peace and order. (Citing cases) * * *. The Fourteenth Amendment did not abridge the right of protection inherent in the States and reserved when the Constitution was adopted. (Citing cases) * * * In Mulger *v.* State of Kansas *supra*, it was said: 'It cannot be supposed that the States intended, by adopting that amendment, to impose restraints upon the exercise of their powers for

the protection of the safety, health, or morals of the community.' For these purposes the Legislatures have a wide field of discretion in classification of subjects of legislation. * * * A statute is not objectionable as class legislation because it affects only the members of one class, if the classification involved in the law is founded upon a reasonable basis. * * * Every presumption will be entertained in favor of the reasonableness of the basis of classification adopted by a State under its police power against an attack based upon the equal protection clause of the Fourteenth Amendment."

It is urged, on behalf of appellants, that the language used in creating the crime is vague and indefinite, and that the Fourteenth Amendment is therefore violated because appellants did not have due notice of the nature of the charge. It is respectfully submitted that this is not so. It is preposterous to contend that any other than a malevolent meaning can be applied to the word "gang" as it is used in this statute. The Legislature did not use the word "gangster" three times in the act, with the intent that its derivative "gang" should have or be susceptible of a perfectly innocent meaning. The only definition of the word in its legal significance that is disclosed by considerable research is that contained in *Hatch* v. *Matthews,* 31 N. Y. Supp. 926 (Words and Phrases, Vol. 4, p. 3040), as follows:

> "The word 'gang' is sometimes used to describe a body of men associated together for purposes entirely proper, as a gang of laborers; but is commonly used to describe a body of men banded together for improper or unlawful purposes, like a gang of thieves, a gang of robbers. * * *"
>
> "The popular and generally accepted meaning of language will be applied to the construction of an act of the Legislature in the absence of a legislative intent to the contrary." Conover *v.* Public Service Ry. Co., 80 N. J. L. 681.

"A Court cannot nullify the enactment of the Leg lature because the language used is indefinite in so particular, unless the purpose or intent of the Leg lature cannot be ascertained. The intent of the Leg lature is the essence of the law, and the function of t Court in construing legislative enactment is to asc tain the legislative intent, and to enforce such int when ascertained. * * * The cardinal principle construing a statute is to seek the intention of t legislative will; and a rule of law equally as w grounded is that the enactment of the Legislatu must be effectuated if possible. The intention of t lawmaker is the law. The Court will not extend t meaning of the statute by construction but such c struction will be given that, when practically appli will aid in preventing the evil which the ascertain intent aimed to prohibit." Hunt *v.* State (India Supreme Court), 146 N. E. 329 at 330.

There is no ambiguity in the use of the phrase "kno to be." Webster's International Dictionary gives, in *alia,* the following definition of "know:"

"To have immediate experience of; to be acquain with; to be no stranger to; to be more or less famil with the person, character, etc., of * * *."

In this sense, it is easily distinguished from the use the word "reputed" in similar statutes, where the lat word has been held to have the force only of opinion. T knowledge required by the statute appears to be qu plainly nothing more than the knowledge of any pers however acquired.

The State of New Jersey has power under its Consti tion and under its *police power* to pass such an act that in dispute before this Court.

(U. S. Sup. Wash. 1923) In the exercise of pol powers the State has wide discretion in determin

its own public policy, and what measures are necessary for its own protection, and to promote the safety, peace and good order of its people. Terrace *v.* Thompson, 44 S. Ct. 15, 263 U. S. 197, 68 L. Ed. 255.

(U. S. Sup. N. C. 1923) A State Legislature may direct its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, notwithstanding the equal protection clause of the Federal Constitution. Farmers' & Merchants Bank of Monroe, N. C. *v.* Federal Reserve Bank of Richmond, Va., 43 S. Ct. 651, 262 U. S. 649, 67 L. Ed. 1157, 30 A. L. R. 635, reversing decree (1922) 112 S. E. 252, 183 N. C. 546.

The police power embraces the protection of the lives, health and property of citizens, the maintenance of good order, and the preservation of good morals. Barbier *v.* Connolly, 113 U. S. 27, 5 S. Ct. 357, 28 L. Ed. 923.

The power of the Legislature to subserve the general welfare of the people by all needful and proper regulations in the interest of health and safety, is inherent in the Sovereignty of the State, and cannot be bartered away by contract or otherwise. New Orleans Gaslight Co. *v.* Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 6 S. Ct. 252, 29 L. Ed. 516.

"Police power springs from State's obligation to protect citizens and provide for safety and good order of society, and its governmental power of self-protection, permitting reasonable regulation of rights and property in particular essential to preservation of community from injury." Panhandle Eastern Pipe Line Co. *v.* State Highway Commission of Kansas, 294 U. S. 613.

"State police power may be extended in aid of that which, by strong and preponderant opinion is thought necessary for public welfare." U. S. Building & Loan Assn. *v.* McClelland, 6 Fed. Supp. 299.

II.

The Statute Is Not Discriminatory, and Does Not Deny to Appellants the Equal Protection of the Law.

In order for the defendants to come within the statute, they must have been convicted at least three times of being a disorderly person, or convicted of a crime in this or any other State; must be not engaged in any lawful occupation; and must be a member of a gang consisting of two or more persons. These elements must concur. (*State* v. *Pius*, 118 N. J. L., 218). The classification is a reasonable one, and it is not shown that the statute would not operate alike on all persons similarly situated.

> "We start with a general consideration that a State may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. The State 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'" Patsone *v.* Pennsylvania, 232 U. S. 138, 58 L. Ed. 539, 543.

In *Keokee Consol. Coke Co.* v. *Taylor*, 234 U. S. 224, 34 S. Ct. 856, 857 L. Ed. 1288, 1290, the Court said:

> "But while there are differences of opinion as to the degree and kind of discrimination permitted by the Fourteenth Amendment, it is established by repeated

decisions that a statute aimed at which is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the Court can see. That is for the Legislature to judge unless the case is very clear."

In *Miller* v. *Wilson*, 236 U. S. 373, 35 S. Ct. 342, 59 L. Ed. 628, 632, L. R. A. 1915 F, 829, in a discussion of classification, the Court, speaking by Mr. Justice Hughes, said:

> "It (the Legislature) is free to recognize the degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms.'"

In *Baldwin* v. *State* (Supreme Court of Indiana), 141 N. E. 343, 345, the Court held:

> "The classification cannot be arbitrary, but must be reasonable. However, the classification will be upheld unless it is so manifestly inequitable and unjust that it would cause an imposition of a burden on one class to the exclusion of another without reasonable distinction. It is primarily for the Legislature to determine the classification, and is never a judicial question unless the classification under no circumstances can be viewed as reasonable."

Appellants also contend that the statute is in violation of due process because of some possible difficulty on the part of defendants in determining whether or not they come within the category proscribed by the statute. In *United States* v. *Balint*, 258 U. S. 250, 66 L. Ed. 604, it was held:

"The Legislature may well consider that the int
or knowledge of the defendant is immaterial, in v
of the widespread evil which his acts cause, equa
whether done with or without knowledge."

In discussing this proposition, Mr. Chief Justice Ta
speaking for the Court, said:

"While the general rule at common law was th
the scienter was a necessary element in the indictme
and proof of every indictment, and this was follow
in regard to statutory requirements, even where t
statutory definition did not, in terms, include it • •
there has been a modification of this view in respect
prosecutions under statutes, the purpose of whic
would be obstructed by such a requirement. It is
question of legislative intent, to be construed by th
Court. It has been objected that punishment of a pe
son for an act in violation of the law, when ignoran
of facts making it so, is an absence of due process o
law. But that objection is considered and overrule
in Shevlin-Carpenter Co. *v.* Minnesota, 218 U. S. 57
69, 70, 54 L. Ed. 930, 935, 936, 30 Sup. Ct. Rep. 663, i
which it was held that in the prohibition or punishmen
of particular acts, the State may, in the maintenance
of a public policy, provide 'that he who shall do them
shall do them at his peril, and will not be heard to
plead in defense, good faith or ignorance.' Many in-
stances of this are to be found in regulatory measures
in the exercise of what is called the police power,
where the emphasis of the statute is evidently upon
achievement of some social betterment, rather than
the punishment of the crimes, as in cases of *mala*
in se."

Some emphasis is placed upon the contention that the
statute attempts an unconstitutional definition of crime, in
that it denies the defendant the right to choose between
engaging and not engaging in a lawful occupation. In this

connection, it is interesting to note the reaction of the Court to a Delaware statute enacted during the late war, requiring all able-bodied men between certain ages to be engaged in some "useful or lawful occupation." While it is conceded that we are not presently engaged in any war, as the term is generally understood, it is submitted that the Court may take judicial notice of the fact that at least a prolonged skirmish is in progress within our borders, between the forces of law and society on the one hand, and the forces of crime on the other. In the case above mentioned, which is that of State *v.* McClure, reported in 105 Atl., 712, the Court said:

> "It is generally known that the demands of the national government in waging the present war have greatly curtailed the means of preventing crime and reduced the number of men available to protect the lives and property of the public. It was proper for the Legislature, having this in mind, to pass reasonable and just laws *to preserve order within the State and to protect the lives and property of those within its borders* (italics ours) by providing that male residents between certain ages should be engaged in some useful or lawful occupation."

It is not intended by these citations to constitute lack of lawful occupation, standing alone, as a crime; but they do illustrate the trend of thought and the fruit of human experience, in both ancient and modern times; and explain what the Legislature undoubtedly had in mind when the law was enacted. This line of reasoning also directs attention to the fact that appellants, in their argument, have fallen into the very obvious error of considering the component parts of this crime separately. Each of the elements set forth in the statute is belabored and excoriated as condemning an act or condition which is perfectly innocent in itself; but one might with similar logic contend that, be-

cause it is no crime for a man to marry, and no crime
a man to have a wife, it is no crime for a man to marry wi
he already has a wife.

A statute very similar to the one under discussion w
held to be valid in *Levine* v. *State*, 110 N. J. L. 467. In t
case, Mr. Justice Heher, speaking for the Court of Err
and Appeals, said:

> "The manifest purpose of this legislation is to ch
> evil in its beginning and thus to insure the pu
> safety. The statute is not arbitrary or unreasona
> It provides for the apprehension and punishment
> a class that menaces the security of person and pr
> erty."

THE ACT IS NOT EX POST FACTO.

It is both impossible and unnecessary to sustain eac
the elements of this crime as a crime in itself. As wa
aptly stated by the N. J. Supreme Court in this case:

> "But the statute is not aimed at punishing convi
> criminals because they are convicted criminals, but
> cause, being such, they become members of a gang
> ganized to plot and commit further crimes, and neg
> or refuse to engage in any lawful occupation.
> act is therefore predicated on two present and vo
> tary acts of the party, both of which must con
> voluntary membership in a gang; and voluntary abs
> tion from work. We see no *ex post facto* legisla
> here." (*State* v. *Pius*, 118 N. J. L. 212.)

Appellants were not tried for the crimes of wh
they had previously been convicted, nor were they t
upon the same set of facts. Indeed, the circumstance
the crimes leading to their former convictions were no
particular moment in this case. Under these conditi
there can be no claim of double jeopardy.

Appellants were not tried for any act done before the effective date of the statute in question. If they had severed their connection with the gang before or immediately upon the adoption of the act, it is conceded that any attempt to prosecute them would have been illegal. Since they did not relinquish their membership in the gang, it is conceivable that a valid indictment could have been returned against them for each day such membership continued, from the effective date of the act until the meeting of the grand inquest.

The prior convictions of defendants do not constitute the crime for which they were tried in this case but only a status forming one of the elements of that crime.

In *Murphy* v. *Ramsey*, 114 U. S. 15, 5 S. C. R. 747, it was held:

> "The disfranchisement, under the Act of March 22, 1882, (22 Stat. L. 30, C. 47, U. S. Ct. 48, Sec. 1461), Section 8, of a man who, having contracted a bigamous or polygamous marriage and become the husband at one time of two or more wives, maintains that relation and status at the time when he offers himself to be registered as a voter, is not *ex post facto*, although, since the passage of that act he may not have cohabited with more than one woman. The disfranchisement operates upon the existing state and condition of the person, and not upon the past events."

The act is not ex post facto, because:

In general, an ex post facto law is a law enacted after an offense has been committed, and which, in relation to it or its consequences, alters the situation of the accused to his disadvantage. The term embraces every law that makes an act done before the passage of the law, and innocent when done, criminal; every law that aggravates a crime or charges the punishment and inflicts a greater punishment than the law annexed to the crime when committed; every

law that alters the legal rules of evidence, and authorizes conviction upon less or different testimony that was required by the law at the times the offense was committed.

Malloy v. *South Carolina*, 237 U. S., 180;
Gibson v. *Mississippi*, 162 U. S., 589;
Duncan v. *Missouri*, 152 U. S. 382;
Burgess v. *Salmon*, 97 U. S. 382;
Thompson v. *Utah*, 170 U. S. 351;
Kring v. *Missouri*, 107 U. S. 235.

The appellants contend that their individual acts of crime were committed before the enactment of the "Gangster Act"; therefore their conviction now is for past acts, now made criminal under our statute.

The appellants fail to interpret the act. Their argument lies on the thought of just one element of the crime—prior conviction. They state that their convictions were before the effective date of the statute, therefor ex post facto.

The statute is made of several elements. (1) Defendant must have been convicted at least three times of being a disorderly person, or convicted of a crime in this or any other State.

(2) Must not be engaged in any lawful occupation.

(3) Must be a member of a gang consisting of two or more persons.

Thus we see that prior conviction is merely an element of a crime, which element by itself would not bring the defendants within this statute. On the other hand, it is this prior conviction element, coupled with two others, namely, association together, and failure to have a lawful occupation which is punishable.

As long as the defendants associated themselves as members of the gang during the running of the statute, they were guilty of the offense described, and continued to

violate said statute each day that they voluntarily associated. It was a new and separate offense each day of association.

Thus we see that the statute was not ex post facto because a new offense was committed each day that the defendants voluntarily associated themselves as members of a gang, each defendant on his own part having fulfilled all requisite elements of the crime made punishable by statute.

We respectfully submit that this Court should dismiss the appeal of appellants.

FRENCH B. LOVELAND,
Prosecutor of the Pleas.

HERBERT F. CAMPBELL,
Assistant Prosecutor of Pleas,
Attorney for the State of
New Jersey.

ROBERT PEACOCK,
Assistant Attorney General
of New Jersey.
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 308.—October Term, 1938.

Ignatius Lanzetta, Michael Falcone and Louie Del Rossi, Appellants, *vs.* The State of New Jersey.

Appeal from the Court of Errors and Appeals of the State of New Jersey.

[March 27, 1939.]

Mr. Justice Butler delivered the opinion of the Court.

By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, § 4, c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment. It as as follows: "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster . . . ".[1] Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. § 5.

In the court of quarter sessions of Cape May County, appellants were accused of violating the quoted clause. The indictment charges that on four days, June 12, 16, 19, and 24, 1936 "they, and each of them, not being engaged in any lawful occupation; they, and all of them, known to be members of a gang, consisting of two or more persons, and they, and each of them, having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters." There was a trial, verdict of guilty, and judgment of conviction on which each was sentenced to be imprisoned in the state prison for not more than ten years and not less than five years, at hard labor. On the authority of its recent decision in *State v. Bell*, 15 N. J. L. Misc. 109, the supreme court entered judgment affirming the conviction. 118 N. J. L. 212. The court of errors and appeals affirmed, 120 N. J. L. 189, on the authority of its decision, *State v. Gaynor*, 119 N. J. L. 582, affirming *State v. Bell*.

[1] The section continues: "provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute." The proviso is not here involved.

If on its face the challenged provision is repugnant to the d process clause, specification of details of the offense intended to charged would not serve to validate it. Cf. *United States* v. *Re* 92 U. S. 214, 221; *Czarra* v. *Board of Medical Supervisors*, 25 A D. C. 443, 453. It is the statute, not the accusation under it, t prescribes the rule to govern conduct and warns against transgr sion. See *Stromberg* v. *California*, 283 U. S. 359, 368; *Lovell Griffin*, 303 U. S. 444. No one may be required at peril of li liberty or property to speculate as to the meaning of penal st utes. All are entitled to be informed as to what the State co mands or forbids.[2] The applicable rule is stated in *Connally General Const. Co.*, 269 U. S. 385, 391: "That the terms of a pe statute creating a new offense must be sufficiently explicit to i form those who are subject to it what conduct on their part w render them liable to its penalties, is a well-recognized requiremen consonant alike with ordinary notions of fair play and the settl rules of law. And a statute which either forbids or requires t doing of an act in terms so vague that men of common intelligen must necessarily guess at its meaning and differ as to its applic tion, violates the first essential of due process of law."

The phrase "consisting of two or more persons" is all that pu ports to define "gang". The meanings of that word indicated dictionaries and in historical and sociological writings are num ous and varied.[3] Nor is the meaning derivable from the comm

---

[2] Champlin Rfg. Co. v. Commission, 286 U. S. 210, 242, 243. Cline v. Fri Dairy Co., 274 U. S. 445, 458. Connally v. General Const. Co., 269 U. S. 3 391-393. Small Co. v. Am. Sugar Ref. Co., 267 U. S. 233, 239. United Sta v. Cohen Grocery Co., 255 U. S. 81, 89-92. Collins v. Kentucky, 234 U. S. 6 638. International Harvester Co. v. Kentucky, 234 U. S. 216, 221-223. People v. Belcastro, 356 Ill. 144. People v. Licavoli, 264 Mich. 643.

[3] American dictionaries define the word as follows:

Webster's New International Dictionary (2d ed.): "gang . . . A manner, or means of going; passage, course, or journey . . . A set or f complement of any articles; an outfit. A number going in or forming a co pany; as, a gang of sailors; a gang of elk. Specif.: . . . A group persons associated under the same direction; as a gang of pavers; a gang slaves . . . A company of persons acting together for some purpo usually criminal, or at least not good or respectable; as, a political gang gang of roughs. . . ."

Funk & Wagnalls New Standard Dictionary (1915): "gang . . . company or band of persons, or sometimes of animals, going or acting togethe a group or squad: sometimes implying cooperation for evil or disreputab purposes; as, a gang of laborers; a gang of burglars; he set the whole ga at work. . . ."

Century Dictionary and Cyclopedia (1902): "gang . . . A numb going or acting in company, whether of persons or of animals: as, a ga

law,[4] for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a "gang."[5]

In *State* v. *Gaynor, supra,* the court of errors and appeals dealt with the word. It said: "Public policy ordains that a combination designed to wage war upon society shall be dispersed and its members rendered incapable of harm. This is the objective of section 4 . . . and it is therefore a valid exercise of the legislative power. . . . The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises; that is the gist of the legislative expression. It cannot be gainsaid that such was within the competency of the legislature; the mere statement of the purpose carries justification of the act. . . . If society cannot impose such taint of illegality upon the confederation of convicted criminals, who have no lawful occupation, under circumstances denoting . . . the pursuit of criminal objectives, it is helpless against one of the most menacing

---

of drovers; a gang of elks. Specifically—(a) A number of persons associated for a particular purpose or on a particular occasion: used especially in a depreciatory or contemptuous sense or of disreputable persons: as, a gang of thieves; a chain-gang . . . (b) A number of workmen or laborers of any kind engaged on any piece of work under supervision of one person; a squad: more particularly, a shift of men; a set of laborers working together during the same hours. . . ."

Part of the text of the definitions given by the Oxford English Dictionary (1933) reads: "gang . . . A set of things or persons . . . A company of workmen . . . A company of slaves or prisoners . . . Any band or company of persons who go about together or act in concert (chiefly in a bad or depreciatory sense, and in mod. usage mainly associated with criminal societies) . . . To be of a gang: to belong to the same society, to have the same interests. . . ."

Another English dictionary, Wyld's Universal Dictionary of the English Language, defines the word as follows: "gang . . . 1. A band, group, squad; (a) of labourers working together; (b) of slaves, prisoners &c. 2. (in bad sense) (a) A group of persons organized for evil or criminal purpose: a gang of burglars &c; (b) (colloq., in disparagement) a body, party, group, of persons: "I am sick of the whole gang of university wire-pullers. . . ."

See: Asbury, Herbert, *The Gangs of New York,* 1927, Alfred A. Knopf. Thrasher, Frederic M., "Gangs" in Encyclopaedia of the Social Sciences, 1931, vol. 6, p. 564, and *The Gang: A Study of 1313 Gangs in Chicago,* 1927, University of Chicago Press.

[4] See, e.g., Champlin Rfg. Co. v. Commission, 286 U. S. 210, 242-243. Connally v. General Const. Co., 269 U. S. 385, 391. Nash v. United States, 229 U. S. 373.

[5] Cf. Kans. Laws 1935, c. 161. Ill. Laws 1933, p. 489, held unconstitutional in People v. Belcastro, 356 Ill. 144. Mich. Comp. Laws (Mason, Supp. 1935) § 17115-167, held unconstitutional in People v. Licavoli, 264 Mich. 643.

forms of evil activity. . . . The primary function of gov ment . . . is to render security to its subjects. And any a chief menacing that security demands a remedy commensurate w the evil."

Then undertaking to find the meaning of "gang" as used in t challenged enactment, the opinion states: "In the construction of t provision, the word is to be given a meaning consistent with the g eral object of the statute. In its original sense it signifies actio 'to go'; in its modern usage, without qualification, it denotes common intent and understanding—criminal action. It is defi as 'a company of persons acting together for some purpose, usu criminal,' while the term 'gangster' is defined as 'a member o gang of roughs, hireling criminals, thieves, or the like.' Webst New International Dictionary (2d ed.). And the Oxford Eng Dictionary likewise defines the word 'gang' as 'any company persons who go about together or act in concert [in modern mainly for criminal purposes].' Such is plainly the legisla sense of the term."

If worded in accordance with the court's explication, the c lenged provision would read as follows: "Any person not enga in any lawful occupation, known to be a member of any gang sisting of two or more persons (meaning a company of per acting together for some purpose, usually criminal, or a comp of persons who go about together or who act in concert, ma for criminal purposes), who has been convicted at least three ti of being a disorderly person or who has been convicted of any cr in this or in any other State, is declared to be a gangster (mean a member of a gang of roughs, hireling criminals, thieves, or like)."

Appellants were convicted before the opinion in *State* v. *Gay* It would be hard to hold that, in advance of judicial u ance upon the subject, they were bound to understand the c lenged provision according to the language later used by court. Indeed the state supreme court (*State* v. *Bell*, *sup* went on supposed analogy between "gang" and offenses nounced by the Disorderly Persons Act, Comp. Stat. Supp. 1 § 59-1 upheld by the court of errors and appeals in *Levine* v. *St* 110 N. J. L. 467, 470. But the court in that case found the m ing of "common burglar" there involved to be derivable from common law.

The descriptions and illustrations used by the court to indicate the meaning of "gang" are not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it does not purport to give any interpretation generally applicable. The state court did not find, and we cannot, that "gang" has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful. The dictionary definitions adopted by the state court extend to persons acting together for some purpose, "usually criminal", or "mainly for criminal purposes". So defined, the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking. The statute does not declare every member to be a "gangster" or punishable as such. Under it, no member is a gangster or offender unless convicted of being a disorderly person or of crime as specified. It cannot be said that the court intended to give "gangster" a meaning broad enough to include anyone who had not been so convicted or to limit its meaning to the field covered by the words that it found in a dictionary, "roughs, hirelings criminals, thieves, or the like". The latter interpretation would include some obviously not within the statute and would exclude some plainly covered by it.

The lack of certainty of the challenged provision is not limited to the word "gang" or to its dependent "gangster". Without resolving the serious doubts arising from the generality of the language, we assume that the clause "any person not engaged in any lawful occupation" is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression, "known to be a member". It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word "known" would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a "gang".

The challenged provision condemns no act or omission; the te
it employs to indicate what it purports to denounce are so va
indefinite and uncertain that it must be condemned as repugnan
the due process clause of the Fourteenth Amendment.

Reversed

Mr. Justice FRANKFURTER took no part in the consideration
decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S